Supreme Court, U.S.
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No. 99-683

IN THE

Supreme Court of the United States

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, Deceased,

Petitioner,

v.

ALUSUISSE FLEXIBLE PACKAGING, INC.,
DAVID ELLISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALUSUISSE FLEXIBLE PACKAGING, INC.

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STATEMENT PURSUANT TO RULE 29.6

There is no parent or publicly-held company owning ten percent (10%) or more of the stock of Lawson-Mardon Flexible, Inc. f/k/a Alusuisse Flexible Packaging, Inc.

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STATEMENT OF THE CASE

A. Facts

The petitioner's decedent, Paul Brierly, was killed in an explosion in the course and scope of his employment with the respondent, Alusuisse Flexible Packaging, Inc. ("Alusuisse") on August 30, 1993, in Shelby County, Kentucky. Rather than pursuing workers' compensation benefits in Kentucky, Brierly's administrator elected to file a wrongful death action based upon the assertion that Alusuisse and a co-employee, David Ellison, "deliberately intended" to kill Brierly, which, it was suggested, exempted him from the exclusive remedy provisions of the Kentucky Workers' Compensation Act. KRS 342.690(1); KRS 342.610(4).

Alusuisse manufactures materials for packaging and labeling. The printing press components which are used to produce the labels develop a buildup of ink and must be disassembled and cleaned periodically with certain solvent cleaning solutions that are flammable.

Three days before the accident, a seal on the machine which was used in the cleaning operation broke and developed a leak. Plans were made to repair the equipment on the following Monday, August 30, 1993. Numerous precautions were taken to minimize the possibility that welding (which was required in order to complete the repairs) would ignite sparks, thereby creating a fire hazard. Some concern had been expressed prior to the work about the possibility of the ignition of sparks during the welding process. The maintenance supervisor and other employees, however, felt that the precautions were sufficient to minimize the danger.

The employees believed that an "LEL" meter would be used during the process to measure the lowest explosive limit of solvent vapor in the area before use of a flammable source. After the explosion, however, it was discovered that no such meter had been used.

A crew was assembled to extinguish any stray sparks with fire extinguishers. Nevertheless, during the process, a spark ignited undetected residual solvent fumes, causing an explosion. The explosion blew off a steel door on the opposite end of the machine. Brierly, who was about 12 feet away, was struck by the door, resulting in his death.

Based upon findings of insufficient safety precautions, the Kentucky Labor Cabinet assessed a $24,500 civil penalty against Alusuisse. The Kentucky Fire Marshal's Office concluded that the explosion was accidental. A Coroner's Jury also found that the explosion was accidental, but concluded that Alusuisse "deliberately placed the decedent (Brierly) and other employees in a known unsafe and hazardous position." It recommended that the case be submitted to the Shelby County Grand Jury. The Grand Jury indicted Alusuisse for reckless homicide under KRS 507.050, a Class D felony. The indictment stated that Alusuisse "recklessly caused the death of Paul D. Brierly by failing to perceive the substantial and unjustifiable risk of explosion which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation as it then existed."

Brierly's administrator filed this action in the Shelby Circuit Court on May 12, 1994, naming Alusuisse and David Ellison, a co-employee, as defendants. (Petitioner's Appendix B and F).

B. Nature of the Proceedings

Within 30 days of service and simultaneous receipt of the Complaint, Alusuisse removed the action to the Federal District Court for the Eastern District of Kentucky on the basis of diversity jurisdiction. Brierly's motion to remand was granted on March 30, 1995, upon the grounds that Alusuisse had failed to establish diversity by showing that Ellison had removed his domicile from Kentucky at the time suit was filed. A subsequent motion to reconsider was denied by the district court upon the grounds that 28 U.S.C. § 1447(d) divested it of jurisdiction. The district court also remanded the case following Alusuisse's second notice of removal.

On November 10, 1995, Brierly filed an amended complaint and for the first time effected service upon Ellison. Ellison removed on the basis of diversity, and Alusuisse consented to Ellison's removal in a timely fashion. The district court denied Brierly's motion to remand following Ellison's removal and subsequently awarded summary judgment to both Alusuisse and Ellison on the merits of Brierly's claim.

The United States Court of Appeals for the Sixth Circuit upheld both the district court's jurisdiction and its award of summary judgment. Brierly's petition for writ of certiorari has ensued. (Petitioner's Appendix A and B).

REASONS FOR DENYING THE WRIT

I.

IN MULTIPLE DEFENDANT CASES, 28 U.S.C. SECTION 1446(b), PROVIDES EACH DEFENDANT WITH 30 DAYS TO FILE A NOTICE OF REMOVAL REGARDLESS OF ANY REMOVAL EFFORT(S) BY AN EARLIER-SERVED DEFENDANT.

The petitioner argues that in all cases a last-served defendant must remove within 30 days of service upon the first-served defendant regardless of the time of service upon him. The Sixth Circuit characterized this rule as "unfair" while recognizing that the question has divided both the courts and the treatises. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999). *See, generally*, 14C WRIGHT MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3rd, § 3732 at 39 (1998); MOORE'S FEDERAL PRACTICE, § 107.30[3][a] (3rd ed. 1999).

Candor requires that we concede a split of authority on the immediate question, but we will not agree that the division is as well-defined as suggested by the petitioner.

The question presented is governed by 28 U.S.C. § 1446(b), which recites as follows:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action

> or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Numerous authorities have recognized that prevailing equitable considerations often justify permitting the last-served defendant to file its notice of removal within 30 days of service upon it. At least six such policy considerations have been advanced:

(1) Section 1446(a) speaks of removal by "a defendant or defendants. . . ." If Congress had intended the 30-day period to commence upon service of the first defendant, it could easily have so stated. *Ford v. New United Motors Mfg., Inc.*, 857 F. Supp. 707, 709 (N.D. Cal. 1994).

(2) The unanimity requirement (that all defendants consent to removal) does not support the harsh first-served rule. The unanimity requirement derives from *Chicago, Rock Island, & Pac. Ry. Corp. v. Martin*, 178 U.S. 245, 248, 20

S. Ct. 854, 855, 44 L. Ed. 1055, 1056 (1900), wherein this Court explained that if all defendants did not join, the plaintiff would be forced to divide the suit into several controversies. A defendant cannot sever an action that the plaintiff elected to make joint. The absolute veto for removal which every defendant has exists regardless of when the removal period commences. There is no reason why the unanimity rule cannot coexist with the last-served rule. *Ford v. New United Motors Mfg., Inc., supra*, at 709; *Collings v. E-Z Serve Convenience Stores, Inc.*, 936 F. Supp. 892, 894 (N.D. Fla. 1996).

(3) The interest of settling the forum early does not justify foreclosing subsequently-served defendants from their statutory right to remove. There can be no real prejudice to a plaintiff, given the control which the plaintiff asserts over any possible prejudice associated with service. "The decision to file suit, whom to sue, when to file suit, and when to serve the complaint are within the exclusive province of the plaintiff." *Ford v. New United Motors Mfg., Inc., supra*, at 710.

(4) The last-served rule precludes plaintiffs from circumventing the rights afforded defendants by deliberately manipulating the timing of service. The removal procedure is intended to be fair to all parties, and the prospect of a defendant not having the opportunity to remove for reasons completely beyond its control is unjust. *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924 (4th Cir. 1992); *Ford v. New United Motors Mfg., Inc., supra*, at 710; *Collings v. E-Z Serve Convenience Stores, Inc., supra*, at 894-95.

(5) The 1988 amendments made petitions for removal subject to Rule 11. This amendment has been characterized as providing "further reason to allow all defendants a full thirty days to investigate the appropriateness of removal." *McKinney v. Board of Trustees of Mayland Community College*, *supra*, at 928. Otherwise, later-served defendants will be required to hurriedly join in a petition for removal and face possible Rule 11 sanctions. "Congress surely did not intend to impose such a Hobson's choice on later served defendants." *McKinney*, *supra*, at 928.

(6) In order to justify application of the first-served rule, it would be necessary for a court to insert the word "first" before "defendant" in the statute. This would constitute an invasion of the congressional prerogative. *McKinney v. Board of Trustees of Mayland Community College*, *supra*, at 927.

The first-served rule is based upon the concept of "waiver." However, in the case at bar, the district court found that Alusuisse's "zealous pursuit of removal is clearly at odds with waiver of the right to remove." *Brierly v. Alusuisse Flexible Packaging, Inc.*, 913 F. Supp. 517, 521 (E.D. Ky. 1996). Alusuisse filed two removal petitions, a motion to reconsider, and a consent to Ellison's removal. Alusuisse's actions were certainly inconsistent with any concept of waiver.

The petitioner suggests that four circuits have considered the question at hand and that the Sixth Circuit stands alone in adopting the last-served rule. Respectfully, this is inaccurate. The Sixth Circuit relied upon *McKinney v. Board of Trustees of Mayland Community College*, *supra*, and though it found the facts to be somewhat different, recognized that the "policy considerations articulated by the Fourth Circuit in *McKinney* are equally applicable to the facts before this court." 184 F.3d at 533.

The petitioner cites *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989), as supporting the first-served rule. In that case, however, the two defendants, Great Republic Life Insurance Company (GRLIC) and Great Republic Insurance Company (GRIC) were for all practical purposes alter egos. The life insurance company, which was added by amended complaint, was represented by the same counsel as the other defendant. The later-served defendant had actually engaged in some pretrial discovery before it was added as a party. The Ninth Circuit, in reversing the district court's ruling that the removal was timely, observed that the district court failed to "consider the fact that GRLIC had acted as a 'party' to the action long before the filing of the amended complaint, by answering and cross-complaining in response to Cantrell's original complaint and by responding to Cantrell's Requests for Admission." 873 F.2d at 1254.

The equitable considerations in *Cantrell* run in a different direction from those in the case at bar.

The Fifth Circuit has held that all first-served defendants must join in a petition for removal no later than 30 days from the date on which the first defendant was served. *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986); *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988). However, as the Court in *McKinney* noted, the legislative history of Section 1446(b) does not address the situation where multiple defendants are served on different dates. The rule in the Fifth Circuit does not promote unanimity, but rather inequity. It would certainly seem that a defendant's right of removal is at least as important as the plaintiff's right to choose his forum.

Numerous courts have held that even if an earlier-served defendant does not attempt to file for removal within its own 30-day period, it may join in a timely removal petition filed by a later-served defendant. *Garside by Garside v. Osco Drug, Inc.*, 702 F. Supp. 19 (D. Mass. 1988); *Eltman v. Pioneer Communications of America, Inc.*, 151 F.R.D. 311 (N.D. Ill. 1993); *Ford v. New United Motors Mfg., Inc.*, *supra*; *Collings v. E-Z Serve Convenience Stores, Inc.*, *supra*; *Adams v. Lederle Laboratories*, 569 F. Supp. 234 (W.D. Mo. 1983); *Freeman v. Bechtel*, 936 F. Supp. 320 (M.D. N.C. 1996).

The petitioner cites *Weimer v. City of Johnstown, N.Y.*, 931 F. Supp. 985, 991, n.6 (N.D. N.Y. 1996), which did adopt the first-served rule under the circumstances there presented, but which distinguished the district court's decision in the case at bar upon the grounds of equitable considerations. In *Weimer*, the defendants shared the same attorneys and, as in *Cantrell*, were entitled to no equitable considerations.

Subsequent to *Brown* and *Getty Oil*, the Fifth Circuit recognized that "it is within the equitable power of the court to reconsider such exceptional circumstances on a case by case basis." *Dole v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992).

II.

THE ONE-YEAR LIMITATION FOR REMOVAL BASED ON DIVERSITY APPLIES ONLY TO CASES THAT ARE INITIALLY NON-REMOVABLE.

In 1988, Congress amended the second paragraph of 28 U.S.C. § 1446(b) to prevent a defendant from removing a case based on diversity jurisdiction more than one year after commencement of the action. The paragraph recites:

> *If the case stated by the initial pleading is not removable*, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a *case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

(emphasis added).

Those circuits which have considered the question have unanimously held that the limitation applies only to actions that become removable sometime after the initial commencement of the action and not to actions that are removable when initially filed. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999) [the underlying decision]; *Ritchey v. Upjohn Drug Company*, 139 F.3d 1313 (9th Cir. 1998); *New York Life Insurance Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998).

The petitioner concedes that the circuit courts are in harmony on this question, but submits that these decisions contravene this Court's holding in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996).

We would respectfully suggest that the *Caterpillar* decision is actually authority for our position. In spite of the language relied upon by the petitioner, the Court in that case was speaking of actions not originally removable. The case is postured in such a way that diversity did not exist at the time of removal but did exist at the time of the district court's decision. Lewis argued that the district court lacked jurisdiction at the time of its judgment. This Court granted certiorari in order to determine whether the absence of complete diversity at the time of removal was fatal to the district court's subsequent adjudication of the case. The Court held that improper removal was not fatal as long as complete diversity existed at the time judgment was entered.

> To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

136 L. Ed. 2d at 452.

Caterpillar, Inc. v. Lewis, *supra*, does not endorse a blanket prohibition. The compelling aspect of this Court's decision in that case is its emphasis on judicial economy rather than strict adherence to a rule which may be subjected to varying interpretations.

In the case at bar, it would be "incompatible with the fair and unprotracted administration of justice" to set aside the district court's adjudication on the merits and remand the case to state court for its determination upon the evidence.

The district court in the case at bar relied in part upon the decision in *Zogbi v. Federated Dept. Store*, 767 F. Supp. 1037 (C.D. Cal. 1991), which held that the one-year limitation against removal of diversity cases applied only to those which are not initially removable rather than to all civil actions. The district court below reasoned: "Placement of the 'except that . . .' clause in the same paragraph as and directly modifying the language dealing with those cases that *become removable* does not allow for a reasonable reading of the limitation to apply to all cases." 913 F. Supp. at 520. (emphasis added).

The court in *Breese v. Hadson Petroleum (USA), Inc.*, 947 F. Supp. 242 (M.D. La. 1996), relied upon the district court's decision in the case *sub judice*. The court there felt that placement of the limitation in the second paragraph "clearly indicates a Congressional intent to restrict the one-year limitation's applicability to those cases that are not initially removable." 947 F. Supp. at 244.

If Congress had intended the limitation to apply to all state court suits, Section 1446(b) would not have been divided into two paragraphs. The *Breese* court reviewed the legislative history of the 1988 amendment and concluded that the amendment's purpose was to discourage removal after substantial progress had been made in the state court, thereby preventing unreasonable delay and disruption. 947 F. Supp. at 244, n.7.

It is an axiomatic general rule of grammar that a qualifying phrase or clause modifies only that which immediately precedes it — not that which may be contained in an earlier paragraph. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 47.33 (5th ed. 1992).

If Congress had intended to preclude removal of all diversity cases commenced more than one year prior to the filing of the notice, it could easily have used language which would accomplish that result.

III.

STRICT CONSTRUCTION DOES NOT MEAN SUCH CONSTRUCTION AS WOULD DEPRIVE A STATUTE OF ITS INTENDED MEANING OR THWART THE LEGISLATIVE PURPOSE.

In suggesting to the court that the case at bar was not removable because of the 30-day rule, the one-year limitation, and the inability of Alusuisse to join in Ellison's petition, the petitioner argues that the decision of the Sixth Circuit fails to comply with this Court's mandate in *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941), which held that removal jurisdiction should be strictly construed.

Federal district courts are authorized to exercise original jurisdiction over controversies involving citizens of different states under Article I, Section 8, of the United States Constitution and 28 U.S.C. § 1332. Congress also conferred upon defendants the right to remove an action from state court to federal court if the district court has original jurisdiction based upon diversity of citizenship. 28 U.S.C.

§ 1441. The congressional purpose was to "secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides." *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111, 18 S. Ct. 526, 530 (1898).

In addition, this Court has declared "that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right. . . ." *Wecker v. National Enameling & Stamping Company*, 204 U.S. 176, 186, 27 S. Ct. 176, 51 L. Ed. 430, 436 (1907).

In *Shamrock Oil & Gas v. Sheets*, *supra*, upon which the petitioner places undue reliance, the Court refused the right of a plaintiff to remove a counterclaim setting up an entirely different cause of action. In so holding, the Court observed that congressional regulation of the jurisdiction of federal courts calls for "strict construction of such legislation."

The petitioner suggests that all of the circuit court and district court decisions which have permitted removal under circumstances similar to those presented in this case do an injustice to the strict construction rule of *Shamrock Oil & Gas v. Sheets*, *supra*, and are indicative of an alarming trend "expanding diversity access to federal court. . . ." (Petition for Writ of Certiorari, at 22).

The petitioner is engaging in semantics. The right to remove is at least as important as the plaintiff's right to choose a forum; and removal on grounds of diversity is based upon the laudable purpose of securing an impartial tribunal.

Furthermore, strict construction, when used in the context of strict compliance with the statute, is not the opposite of liberal construction and does not require, or even

suggest, such a strained or narrow interpretation of language as to defeat the object of a statute. Ordinary words are to be given their ordinary meaning, and well-established rules of grammar must be employed in ascertaining the legislative intent. *Haywood v. Fowler*, 190 Mich. App. 253, 475 N.W.2d 458 (1991); *Appeal of Alex R. Masson, Inc.*, 21 Kan. App. 2d 863, 909 P.2d 673 (1995).

Strict construction is not incompatible with fair construction.

IV.

NEITHER THE 30-DAY NOR THE ONE-YEAR PROVISION OF SECTION 1446(b) IS JURISDICTIONAL.

At the time of the removal and the district court's subsequent disposition of the case on its merits, Section 1447 provided in relevant part as follows:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. * * *.
>
> (d) an order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*. . . .[1]

(emphasis added).

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1. Effective October 1, 1996, Congress amended Section 1447(c) by striking "any defect in removal procedure" and inserting in its place "any defect other than subject matter jurisdiction." Pub. L. 104-219, § 1, 110 Stat. 3022. That amendment, however, is not relevant here.

Relying upon the "otherwise" language of Section 1447(d), the petitioner suggests that the district court lost jurisdiction of the case upon the initial remand. He relies upon *Chandler v. O'Bryan*, 445 F.2d 1045 (10th Cir. 1971), and *Federal Deposit Insurance Corporation v. Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979).

The district court agreed that its decision remanding Alusuisse's petition was final. For that reason, it did not entertain our petition for reconsideration or our second petition for removal. However, this does not mean that consideration of Ellison's petition is barred by Section 1447(d). Our second removal petition did not "reinvest" the district court's jurisdiction. The decision remanding our motion was final. However, the district court did have jurisdiction to entertain the separate petition of Ellison, a subsequently-served defendant. This is the principle which distinguishes all three cases upon which the plaintiff relies.

It is generally recognized that neither the 30-day nor the one-year time limit is jurisdictional. They are merely modal and formal. *Barnes v. Westinghouse Electric Corp.*, 962 F.2d 513, 516 (5th Cir. 1992), *cert. denied*, 506 U.S. 999, 113 S. Ct. 600, 121 L. Ed. 2d 536 (1992) (one year); *International Gateway Communications, Inc. v. Communication Telesystems Int'l, Inc.*, 922 F. Supp. 122, 124 (N.D. Ill. 1996) (30 days); *Garside by Garside v. Osco Drug, Inc.*, 702 F. Supp. 19, 21 (D. Mass. 1988) (30 days); *Eltman v. Pioneer Communications of America, Inc.*, 151 F.R.D. 311, 315 (N.D. Ill. 1993) (30 days); *Ford v. New United Motors Mfg., Inc.*, 857 F. Supp. 707, 708 (N.D. Cal. 1994) (30 days); *Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543, 545 (N.D. Cal. 1989) (30 days).

Again, this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), is relevant. There the district court permitted removal at a time when complete diversity did not exist. If, as Brierly seeks to maintain, that court had no subject matter jurisdiction at that time, its subsequent disposition of that case on the merits was unjustifiable. This Court, however, overlooked the "procedural" irregularities and approved of the district court's resolution of the case on its merits. Since complete diversity did exist at the time judgment was entered, the Court concluded that any other resolution would constitute a *waste of judicial resources*. 136 L. Ed. 2d at 452. The very same considerations prevail in the case *sub judice*.

V.

ALUSUISSE DID NOT WAIVE ITS RIGHT TO REMOVAL AND WAS ENTITLED TO CONSENT TO ELLISON'S NOTICE OF REMOVAL.

The district court held that Alusuisse vigorously pursued its removal rights and, consequently, did not at any time waive its right to remove. The petitioner suggests that Alusuisse, having failed to successfully remove in its initial attempt, cannot "piggy-back" Ellison's later notice of removal. This is little more than a rehash of the petitioner's other arguments. He relies upon *Getty Oil Corporation v. Insurance Company of North America*, 841 F.2d 1254 (5th Cir. 1988), to the effect that there is a single date-of-removal which expires 30 days after service on the first defendant entitled to remove.

Getty Oil, however, has not been followed by many courts which have considered its reasoning. In *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 926-27 (4th Cir. 1992), the Fourth Circuit stated:

> We do not find the *Getty Oil* conclusion to be logical. * * * Although the *Getty Oil* court stated that its rule "promotes unanimity among the defendants," *id*, "unanimity" appears to be an inappropriate word choice. Rather, in establishing one fixed deadline for defendants served as much as thirty days apart, a better term for what the *Getty Oil* rule could lead to is "inequity."

The position taken by the petitioner was also met with disapproval in *Freeman v. Bechtel*, 936 F. Supp. 320, 326 (M.D. N.C. 1996), wherein the Court stated:

> Section 1446(b) provides each defendant in a multi-defendant case with thirty days to file a notice of removal. While a first-served defendant having failed to initiate a removal within thirty days of service may have waived the right to do so, *there is no compelling reason for precluding a first-served defendant from joining in or consenting to a later-served defendant's removal.*

(emphasis added).

At the district court level, Brierly sought to maintain that the court's remand of the Alusuisse petitions barred Ellison's notice under the doctrine of res judicata, or more precisely, issue preclusion. He has abandoned that argument at this level.

The fact is that ultimately the district court determined that diversity existed at the time the action was filed as well as at the time of removal. Therefore, under the rationale adopted by the Supreme Court in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), it was the court's obligation to determine the case on its merits. That determination, in the interest of judicial economy, should stand. The plaintiff should not be allowed to go back to the Shelby Circuit Court and rehash arguments based upon extensive discovery which was undertaken in the federal court.

VI.

WANTON AND MALICIOUS CONDUCT EVIDENCING A CONSCIOUS INDIFFERENCE ON BEHALF OF AN EMPLOYER TOWARD AN EMPLOYEE DOES NOT CONSTITUTE A DELIBERATE INTENTION ON THE PART OF THE EMPLOYER TO PRODUCE INJURY OR DEATH SO AS TO PRECLUDE AN APPLICATION OF THE EXCLUSIVE REMEDY PROVISIONS OF THE KENTUCKY WORKERS' COMPENSATION ACT.

KRS 342.690(1) bars common law tort actions against employers for damages arising out of work-related injuries. The only exception to this provision is where the injury or death "results to an employee through the deliberate intention of his employer to produce such injury or death." KRS 342.610(4). In his Complaint, Brierly alleged:

> 6. That Defendants knew immediately prior to the explosion that their intended course of action created a known unsafe and hazardous work environment which could or would result

> in serious bodily injury or death to its employees, or others, including Paul Brierly, yet deliberately placed Plaintiff's decedent in a position of imminent peril.

(Respondent's Appendix, A).

The leading cases in Kentucky which deal with the "deliberate intention" exception are *Fryman v. Electric Steam Radiator Corp.*, Ky., 277 S.W.2d 25 (1955), and *McCray v. Davis H. Elliott Co.*, Ky., 419 S.W.2d 542 (1967). Both cases were resolved by dispositive motions.

In *Fryman*, the plaintiff-employee alleged that he was required to work with machinery that was defective and dangerous, that his employer was aware of the unsafe condition of the machinery but nevertheless allowed the employee to work around the equipment, and that he failed to install safety devices which would have prevented the employee's injury.

In *McCray*, it was alleged that the employee was required to work in a dangerous place in close proximity to a highly-charged wire, that the employee did not have the experience necessary to appreciate the danger, that the employer was aware of the danger but nevertheless failed to install the proper equipment to minimize the danger, and that as a result the employee was electrocuted.

In both *Fryman* and *McCray* the highest court in Kentucky held that the conduct of neither employer fell within the meaning of the phrase "deliberate intention." The court concluded that wanton and gross negligence does not constitute deliberate intention. The *Fryman* court referred

to numerous cases from other jurisdictions which were in agreement and concluded that the statute must be accepted as written since "the words used in the statute are clear and unambiguous." 277 S.W.2d at 27.

The petitioner's suggestion that an intent to injure or kill can be inferred from reckless or wanton conduct is simply not true.

The district court in the case at bar held that Brierly's "allegations are insufficient to meet the specific or deliberate intent exception and do not constitute an action at law given the exclusive remedy of the Kentucky Workers' Compensation Act." (Petitioner's Appendix, 54a-55a). The district court further observed that "even if all the allegations of negligence and sloppiness are true, this does not add up to a specific intent on behalf of Alusuisse to harm or kill Mr. Brierly." (Petitioner's Appendix, 55a).

Even if Alusuisse's actions constituted gross oversight which would rise to the level of a criminal offense, this would not be relevant to a determination of whether or not that conduct constituted a deliberate intention to injure or kill the employee. Nothing short of a "deliberate intention" to injure the employee falls outside the exclusive remedy provisions of the Kentucky Act. It is universally recognized in workers' compensation cases that a statute permitting an employee's common law action against the employer for work-related injuries requires a finding that the employer had an opportunity to weigh the consequences and made a conscious choice to injure someone. Conscious indifference on the part of the employer does not equate with deliberate intention. *Lusk v. Monaco Motor Homes, Inc.*, 97 Or. App. 182, 775 P.2d 891 (1981).

CONCLUSION

It is respectfully submitted that the petitioner has failed to sustain his burden of establishing that the district court erred for any reason in permitting removal of these proceedings from the state court on the basis of Ellison's petition. The decision below did not involve a compelling question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals correctly held that both decisions of the district court (granting removal and awarding summary judgment) were correct.

Respectfully submitted,

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APPENDIX

APPENDIX — COMPLAINT DATED AND FILED MAY 12, 1994

SHELBY CIRCUIT COURT
NO. 94-CI-00167

JEFFREY D. BRIERLY, Administrator of
the Estate of Paul Brierly, deceased
133 Rockridge Road
Shelbyville, Kentucky 40065

PLAINTIFF

vs.

ALUSUISSE FLEXIBLE PACKAGING, INC.
6700 Midland Industrial Drive
Shelbyville, Kentucky 40065
(SERVE: Secretary of State)
Frankfort, KY 40601

DEFENDANT

and

DAVID ELLISON
(Serve at place of employment)
Alusuisse Flexible Packaging, Inc.
6700 Midland Industrial Drive
Shelbyville, Kentucky 40065

COMPLAINT

** ** ** ** **

Appendix

Comes the Plaintiff, Jeff Brierly, Administrator of the Estate of Paul Brierly, deceased, and for his complaint and cause of action against the Defendants, Alusuisse Flexible Packaging, Inc., and David Ellison, states as follows:

1. That on September 30, 1993, Jeffrey D. Brierly was appointed administrator of the estate of Paul Brierly, deceased, by Order of the Shelby District Court, Probate Division, Action No. 93-P-00209. A copy of the Certificate of Qualification is attached hereto and marked as Exhibit "A".

2. That the Defendant, Alusuisse Flexible Packaging, Inc., is a Missouri corporation conducting or transacting business within the Commonwealth of Kentucky, amenable to service of process pursuant to KRS 454.210 (the Kentucky Long Arm Statute) and/or has failed to appoint or maintain a registered agent in this state, and by virtue of KRS 454.210, the Secretary of State is deemed the statutory agent for service of process.

3. That at all times material hereto, the Defendant, David Ellison, was a resident of the Commonwealth of Kentucky, employed by the co-defendant, Alusuisse Flexible Packaging, Inc., acting as "Safety and Environmental Officer", and acting within the course and scope of his employment.

4. That at all times material hereto, the Plaintiff's decedent Paul Brierly was, a co-op student for maintenance, attending Shelby County Vocational School, and assigned to the defendant, Alusuisse Flexible Packaging, Inc., and acting at the specific direction of supervisors at Alusuisse Flexible Packaging, Inc., including the Defendant, David Ellison.

Appendix

COUNT I

5. That on or about August 30, 1993, in Shelbyville, Shelby County, Kentucky an explosion occurred at the production facility of Alusuisse Flexible Packaging, Inc., which caused and brought about the death of Plaintiff's decedent, Paul Brierly, by reason of which Plaintiff has sustained damages in excess of the minimal jurisdictional amount of this Court.

6. That Defendants knew immediately prior to the explosion that their intended course of action created a known unsafe and hazardous work environment which could or would result in serious bodily injury or death to its employees, or others, including Paul Brierly, yet deliberately placed Plaintiff's decedent in a position of imminent peril.

7. That Defendants failed and refused to take even the minimal safety precautions required by local, state and/or federal law, and took affirmative and intentional actions in violation of such laws, all of which caused and brought about the death of Plaintiff's decedent.

8. That the death of Paul Brierly on August 30, 1993, resulted from the deliberate, wilful and unprovoked intention of the defendant Alusuisse Flexible Packaging, Inc., and David Ellison, to produce serious injury or death as contemplated by KRS 342.610 (4), and/or KRS 342.690 (1) such that the prosecution of this action is without the restrictions of KRS Chapter 342, the Kentucky Workers Compensation Act.

Appendix

COUNT II

9. The Plaintiff repeats, reiterates, adopts and hereby incorporates by reference each and every allegation previously set forth as if fully and completely set forth herein.

10. That on several occasions prior to the explosion of August 30, 1993, the Defendants, Alusuisse Flexible Packaging, Inc. and/or David Ellison, engaged in the same conduct which caused and brought about the explosion of August 30, 1993, to-wit: require employees to start welding without providing or allowing proper ventilation of combustible cleaning solvent vapors; which conduct resulted in "flash" fires.

11. That the occurrence of such "flash" fires is required to be reported to state and local officials in order to prevent the reoccurrence of such safety hazards.

12. That the Defendants, Alusuisse Flexible Packaging, Inc., and/or David Ellison, deliberately and intentionally failed and refused to report the occurrence of such fires to the local and state authorities, as required by law, such that the identical safety hazard was allowed to reoccur on August 30, 1993, by reason of which Paul Brierly is now deceased.

13. That the conduct of the Defendants in deliberately placing Plaintiff's decedent in a known unsafe and hazardous position was and is malicious and oppressive, and the failure to strictly comply with specific safety violation laws constitute fraud, by reason of which the Plaintiff is entitled to punitive and exemplary damages in an amount reasonably necessary to punish and to discourage Defendants and others from engaging in similar conduct in the future.

14. That the damages demanded herein exceed the minimal jurisdictional amount of this Court.

WHEREFORE, Plaintiff respectfully demands and prays as follows:

1. For judgment against the Defendants jointly and severally, in an amount which will fairly and reasonably compensate Plaintiff for his claimed damages;

2. For punitive and exemplary damages in an amount reasonably necessary to punish and to discourage Defendants and others from engaging in similar conduct in the future;

3. For his costs herein expended, including a reasonable fee for his attorney;

4. For trial by jury on all issues so triable;

5. For leave to amend as additional claims or causes of action may be revealed in the course of discovery; and

6. For any and all other relief, in the premises, to which he may appear to be entitled.

s/ Fred E. Fischer
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